Supreme Court, U. S.
FILED
NOV 26 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76–614

BRIAN WILLIAM FIRTH,

Appellant,

v.

GORDON THOMPSON, et al, Justices of the Supreme Court of the State of Nevada,

Appellees.

MOTION TO DISMISS PURSUANT TO RULE 16, REVISED RULES OF THE UNITED STATES SUPREME COURT

Jerry Collier Lane
P.O. Box 2028
Carson City, Nevada 89701
Attorney for Appellant

Robert List
Attorney General
Supreme Court Building
Capitol Complex
Carson City, Nevada 89710
Attorney for Appellees

IN THE

SUPREME COURT OF THE UNITED STATES

* * * *

October Term 1976

* * * *

76-614

BRIAN WILLIAM FIRTH, Appellant

v.

GORDON THOMPSON, et al, Justices of the Supreme Court of the State of Nevada, Appellees

MOTION TO DISMISS PURSUANT TO RULE 16, REVISED RULES OF THE UNITED STATES SUPREME COURT

Appellees, Gordon Thompson, et al, Justices of the Nevada State Supreme Court, respectfully move this Court to dismiss the appeal heretofore taken in this cause pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States on the grounds that the appeal is not within the jurisdiction of this Court because it is not taken in conformity with these rules, it does not present a substantial federal question and that the judgment of the lower courts rests on adequate non-federal bases.

BRIEF AND ARGUMENT

I

THE APPELLANT HAS FAILED TO DOCKET HIS CASE WITHIN THE TIME REQUIREMENTS OF RULE 13 OF THE REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES.

Rule 13 of the Revised Rules of the Supreme Court of the United States requires that the case be docketed "not more than ninety days after the entry of the judgment appealed from ...." The final judgment of the United States Court of Appeals for the Ninth Circuit in this proceeding was entered on June 21, 1976. The time for docketing this case on appeal expired September 20, 1976. This case was subsequently docketed in the Supreme Court of the United States on November 1, 1976, more than 50 days after the final date for docketing. On September 17, 1976, appellant filed an application for extension of time to docket the appeal. However, the application for extension of time in which to docket the appeal was denied by the Honorable Justice Renquist on September 22, 1976.

Therefore, this appeal has not been docketed in accordance with Rule 13 and should be dismissed pursuant to Rule 16(1)(a).

II

NO SUBSTANTIAL FEDERAL QUESTION HAS BEEN PRESENTED BY THE APPELLANT AS REQUIRED BY 28 U.S.C.A. 1254(2).

On March 15, 1971, appellant was issued a ticket by an officer of the Nevada Highway Patrol for speeding and running a stop sign. After issuing the citation to the appellant, the patrolman returned to his car. Appellant thereafter drove at a speed of 65 miles per hour in a 50 mile per hour zone at which time he was stopped again and given another citation for speeding. Record on appeal to U.S. Court of Appeals for the Ninth Circuit, hereinafter referred to as "Record on Appeal", pp 92 - 94.

The appellant was subsequently convicted of three charges in justice court. He appealed to the district court pursuant to Article 6, Section 6 of the Nevada Constitution and NRS 3.190, Subsection 2. In a trial de novo, he was again convicted on April 5, 1971. There is nothing in the court's decision to suggest that it had ruled on the constitutionality of the traffic ordinances involved. Record on Appeal, page 100. Appellant then filed a Petition For Writ of Certiorari on May 14, 1971, Case No. 6641, in the Supreme Court of the State of Nevada. This petition was dismissed on May 19, 1971, and a Petition for Rehearing was filed June 3, 1971. Order Denying Rehearing was filed June 23, 1971.

On November 27, 1970, the appellant was ticketed in Reno, Nevada, for failure to have at least two operative tail lenses. He was convicted in Justice Court on June 20, 1971, and fined. The appellant thereafter appealed to the Second Judicial District Court for a trial de novo and was subsequently convicted by virtue of the statement of facts (Record on Appeal, page 104) and the brief submitted by appellant in pro. per. Nowhere in said court file is there an order or judgment passing upon the constitutionality of the traffic laws in question. Record on Appeal, page 108. Appellant then filed for a Petition for Writ of Certiorari to the Nevada State Supreme Court on July 28, 1971. The court dismissed the Writ on September 28, 1971, holding:

> "Upon consideration by the court of the Petition for a Writ of Certiorari, and response in opposition thereto filed by respondent; and the court being unable to find any arguable issues presented by the petition to warrant further consideration; the court further finding that the petition is without merit for failure to cite any supporting authorities; and good cause appearing, it is
>
> "ORDERED that the respondent's motion to dismiss is granted, and the Petition for a Writ of Certiorari is dismissed. Riverside Casino Corp. v. Brewer Co., 80 Nev. 153, 390 P.2d 232 (1964); Smithart v. State, 86 Nev. 925, 478 P.2d 576 (1970); (other citations omitted)."

In a third case, the appellant was again given a traffic citation for the offense of crossing a double yellow center line and passing another vehicle. He was convicted in justice court and appealed to the Second Judicial District Court for a trial de novo resulting in a conviction on April 9, 1971. Thereafter, the appellant filed a Petition for Writ of Certiorari on July 21, 1972. On August 22, 1972, the Nevada Supreme Court ordered the Petition for Writ of Certiorari denied without opinion. Appellant's counsel sought an extension of time for filing a Petition for Rehearing, and on September 21, Petition for Rehearing was filed. On September 28, 1972, the Petition for Rehearing was denied.

At no time in the lower courts has the appellant raised any federal question, much less, a substantial federal question as is required by this honorable court. Therefore, appellant has not satisfied the jurisdictional requirements of 28 U.S.C.A. 1254(2). It is well established that when an appeal to the U.S. Supreme Court is attempted in the absence of a statutory ground for such appeal it will be dismissed for want of jurisdiction. Hunter Co. v. McHugh, 320 U.S. 222 (1943). Thus, dismissal of the appeal may result where no revealable federal question is involved or where the asserted federal question is unsubstantial or frivolous or has been foreclosed by prior decisions of the state court. Leonard v. Vicksburg, S. & P.R. Co., 198 U.S. 416 (1905). Madison v. Stanolind Oil and Gas Co., 305 U.S. 376 (1939).

It is clear from the orders of the Nevada Supreme Court in cases 6641 and 6706, attached hereto, that the Nevada Supreme Court considered the merits of the appellant's Petitions for Writ of Certiorari. In both cases the court, after consideration, found there to be no arguable issues and dismissed appellant's Petitions for Writ of Certiorari.

Thereafter, appellant filed a petition in U. S. District Court for the District of Nevada, asking for declaratory relief from the Nevada Supreme Court's denial of appellant's writs of certiorari. The Honorable Bruce R. Thompson denied appellant's petition for declaratory judgment as well as subsequent "Motion for Relief" for lack of merit. Appellant then appealed to the Ninth Circuit Court of Appeals which affirmed the judgment of the District Court.

It is clear that the reason for the dismissals was for lack of merit and that there was no denial of the appellant's constitutional right of due process.

III

THE DETERMINATION BY THE NEVADA SUPREME COURT TO DENY THE APPELLANT'S WRIT FOR CERTIORARI RESTED ON ADEQUATE NON-FEDERAL GROUNDS.

All of the original traffic citations received by appellant were within the original jurisdiction of the Nevada.justice courts. Article 6, Section 4, and Article 6, Section 6, of the Nevada Constitution set forth the jurisdiction of the Nevada courts. Article 6, Section 6, jurisdiction of district courts states:

> "They shall also have final appellate jurisdiction in cases arising in justice courts and such other inferior tribunals as may be established by law."

Nevada Revised Statute 34.020 is set forth by appellant as valid grounds for obtaining certiorari by the Nevada Supreme Court under his facts. However, to the extent that NRS 34.020 is an attempt by the legislature to override the Constitution of the State of Nevada and requires the Nevada State Supreme Court to entertain proceedings that originally began in justice courts, NRS 34.020 is unconstitutional. It is a violation of the separation of powers clause of Article 3, Nevada State Constitution. A reading of Article 6, Sections 4 and 6 of the Nevada Constitution leaves no doubt that review as a matter of right in cases arising in justice courts ends in district court. Appellate review as a matter of right in the Supreme Court exists in criminal cases only where those cases originated in the district court. Therefore, there is no right to appellate review in the Nevada Supreme Court for cases arising in justice courts. An order authorizing proceedings in certiorari in the Nevada Supreme Court is a discretionary order. Nevada Lincoln Mine Co. v. District Court, 43 Nev. 396, 402; 187 P. 1006 (1920).

Because the Nevada Supreme Court has the constitutional authority to review through the discretionary writ of certiorari, convictions of municipal and justice courts, any effort by the legislature to

circumscribe this judicial authority such as NRS 34.020, is unconstitutional. It conflicts with the rules of court thus coming into conflict with Article 3, Section 1 of the Nevada Constitution which provides for the division of the powers of government and prohibits persons charged with the exercise of powers properly belonging to one of the three separate departments from exercising any function appertaining to any of the others. Any legislation undertaken to require judicial action within fixed periods of time is an unconstitutional interference by the legislature with a judicial function. See Lindauer v. Allen, 85 Nev. 430, 456 P.2d 851 (1969).

Therefore, it is respectfully requested that this honorable court dismiss appellant's appeal in accordance with, and pursuant to, Revised Supreme Court Rules 16(1)(a) and 16(1)(b).

Respectfully submitted this 16th day of November, 1976.

ROBERT LIST
Attorney General

JAMES H. THOMPSON
Chief Deputy
Attorney General

DONALD C. HILL
Deputy Attorney
General

Counsel for
Respondents

IN THE SUPREME COURT

OF THE STATE OF NEVADA

BRIAN WILLIAM FIRTH, Petitioner, vs. SECOND JUDICIAL DISTRICT COURT of the STATE OF NEVADA, Respondent.	)	No. 6706 (Filed Sep 28, 1971)

ORDER OF DISMISSAL

Upon consideration by the court of the petition for a writ of certiorari, and the response in opposition thereto filed by the respondent; and the court being unable to find any arguable issues presented by the petition to warrant further consideration; and the court further finding that the petition is without merit for failure to cite any supporting authorities; and good cause appearing, it is

ORDERED that the respondent's motion to dismiss is granted, and the petition for a writ of certiorari is dismissed. Riverside Casino Corp. v. Brewer Co., 80 Nev. 153, 390 P.2d 232 (1964); Smithart v. State, 86 Nev. 925, 478 P.2d 576 (1970); Carson v. Sheriff, 87 Nev. ___, 487 P.2d 334 (1971); Marshall v. Sheriff, 87 Nev. ___, ____P.2d ____, (Case No. 6658 filed September 23, 1971).

/s/ Zenoff, C.J.

/s/ Batjer, J.

/s/ Mobray, J.

cc: Counsel of record

IN THE SUPREME COURT

OF THE STATE OF NEVADA

BRIAN WILLIAM FIRTH, Petitioner,	)	No. 6641
vs.	)	
FIRST JUDICIAL DISTRICT COURT of the STATE OF NEVADA, Respondent.	)	(Filed May 19, 1971.)

ORDER OF DISMISSAL

Upon consideration of the petition for a writ of certiorari with its supporting exhibit, the court finds that there are presented no arguable issues to warrant the granting of the requested writ.

CONSEQUENTLY, we decline to order the filing of a response to the petition; and good cause appearing, it is

ORDERED that the petition for a writ of certiorari is dismissed.

/s/ Zenoff, C.J.

/s/ Batjer, J.

/s/ Mowbray, J.

cc: Hon. Robert List, Attorney General
Hon. Michael Fondi, District Attorney
Hon. Vaughn Smith, Clerk
Jerry C. Lane, Esq.